DLC Corp. d/b/a FleetBoston Pavilion *and* International Alliance of Theatrical Stage Employees and Moving Picture Technicians and Allied Crafts of the United States and its Territories and Canada, Petitioner. Case 1–RC–21210

March 16, 2001

DECISION AND CERTIFICATION OF REPRESENTATIVE

BY CHAIRMAN TRUESDALE AND MEMBERS LIEBMAN AND WALSH

The National Labor Relations Board, by a three-member panel, has considered objections to an election held on August 28, 2000, and the hearing officer's report recommending disposition of them. The election was conducted pursuant to a Decision and Direction of Election issued by the Regional Director on July 24, 2000. The tally of ballots shows 29 for and 0 against the Petitioner, with 1 challenged ballot, which was insufficient to affect the results.

The Board has reviewed the record in light of the exceptions and briefs, and adopts the hearing officer's recommendations[1] only to the extent consistent with this Decision and Certification of Representative.

1. The Employer operates an outdoor entertainment venue in Boston, Massachusetts, known as the FleetBoston Pavilion (Pavilion). The Employer and the Petitioner's Local 11 are parties to a collective-bargaining agreement covering half the stagehands working at any given time at the Pavilion. The election was held in a unit of all the Employer's stagehands.

In Objection 1, the Employer contends that it was objectionable conduct for the Petitioner to promise during its campaign, to negotiate a collective-bargaining agreement that would base entitlement to work on the amount of time the employee had worked for the Employer at the Pavilion. We agree with the hearing officer that the Petitioner's conduct was not objectionable and that the Employer's reliance on *Alyeska Pipeline Service Co.,* 261 NLRB 125 (1982), to support its argument that Objection 1 be sustained, is misplaced. However, we do not agree with his distinguishing of *Alyeska* from this case on the basis that *Alyeska* involved "intra-unit discrimination."

The Board has held that

> Employees are generally able to understand that a union cannot obtain benefits automatically by winning an election but must seek to achieve them through collective bargaining. Union promises . . . are easily recognized by employees to be dependent on contingencies beyond the Union's control and do not carry with them the same degree of finality as if uttered by an employer who has it within his power to implement promises or benefits. [*Smith Co.,* 192 NLRB 1098, 1101 (1971).]

Alyeska represents a limited exception to this general rule. In *Alyeska,* the union controlled "all access to construction jobs in Alaska" for the employees participating in the election.[2] Therefore, when the union suggested that the only way employees could obtain a union card was by voting for the union in the upcoming election, and that "those fortunate enough to possess a Local 1547 membership card would be in an extremely favorable priority position [when it came to hiring] compared with those lacking a card,"[3] it was clear not only that the union was promising to grant members an advantage over nonmembers in obtaining jobs, but also that the union had the power to effectuate that promise. In *Station Operators, Inc.,* 307 NLRB 263 fn. 1 (1992), the Board made clear that the holding in *Alyeska* was tied to its special facts:

> In *Alyeska Pipeline*, the Board found that a union engaged in objectionable conduct by suggesting during an election campaign that members would have an advantage over nonmembers in obtaining jobs through the union's exclusive hiring hall. The situation here is not akin to the hiring hall context[] in [*Alyeska*], where the union controlled access to jobs. In addition, the Petitioner's letter does not promise to represent or treat members differently from nonmembers, but rather sets forth the benefits that allegedly could be obtained from collective bargaining and union membership. Such statements do not exceed the bounds of privileged campaign propaganda.

Here, unlike *Alyeska,* the Union does not maintain exclusive control of staffing and referrals. Rather, hiring procedures for the Pavilion would be subject to the collective-bargaining process. In addition, the Union's promise was made to all employees without reference to union membership or support. Under these circumstances, we agree with the hearing officer that Objection 1 should be overruled.

2. Objection 3 alleges that the Petitioner's designation of Local 11 President Robert P. Volosevich as the Petitioner's election observer was objectionable because he was (1) not an employee of the Employer and (2) responsible for referring eligible voters for work at FleetBoston Pavilion and other venues where Local 11 supplies employees.

[1] In the absence of exceptions, we adopt pro forma the hearing officer's recommendation to overrule the Employer's Objections 2 and 4.

[2] 261 NLRB at 127.

[3] Id. at 126.

We agree with the hearing officer that Volosevich's serving as the Petitioner's observer during the election did not constitute objectionable conduct.[4] First, Volosevich had worked frequently for the Employer until about 4 years ago when he sustained a back injury on the job. Indeed, Volosevich is scheduled to undergo surgery in the near future which, if successful, will allow him to resume the work he had performed for the Employer. In view of Volosevich's employment history with the Employer, he was capable, as election observers must be, of properly identifying the employees who came to vote.

Further, contrary to the Employer's contention, the evidence established that Volosevich played no role in the hiring hall's referral of employees for work and that there was no opportunity for him to exert potential or actual coercion over the voting preferences of the employees in the unit. It is the duty of Local 11's business manager, not its president, to operate the hiring hall and to assign work. The only evidence the Employer could offer to show that Volosevich had any control over the hiring hall or assignment of work was a vague statement in the Local's constitution that the president is obligated to "see that all officers perform their respective duties." From this single statement, the Employer asserts that because Volosevich was responsible to see that other officers, including the business manager, performed their duties he was ultimately responsible for the business manager's assignment of work. This falls far short of establishing that Volosevich controlled the assignment of work to unit employees.

Finally, there is no contention that Volosevich engaged in any misconduct or electioneering during his tenure as the Petitioner's election observer, and there is no evidence that Volosevich's participation as an observer resulted in any prejudice to the fairness of the election. For all these reasons, we agree with the hearing officer that Objection 3 should be overruled.

3. The hearing officer found, in agreement with the Regional Director in her Decision and Direction of Election, that the Employer's contract with Local 11 was an unlawful members-only agreement.[5] On that basis alone, he recommended that the election be set aside and a new election directed. We reverse. Contrary to the hearing officer, we find that the Employer's contract with Local 11 is not a proper basis on which to set this election aside.

First, The Employer did not object to the election based on the hiring hall relationship between Local 11 and the Employer. Therefore, the issue was not before the hearing officer. As the Board stated in *Precision Products Group,* 319 NLRB 640, 641 (1995), a hearing officer lacks authority to "consider issues that are not reasonably encompassed within the scope of the objections that the Regional Director set for hearing." In *Iowa Lamb Corp*., 275 NLRB 185 (1985), the hearing officer asserted that "the absence of a specific objection did not foreclose considering the conduct as objectionable," and the Board responded as follows:

> The Petitioner did not allege that the statement was objectionable, the Regional Director did not identify it as an issue in his order directing hearing, and at the hearing the hearing officer did not inform the parties he would consider it in his report. Further, based on our review of the record, we find that the issue was not fully litigated. We therefore conclude that the hearing officer erred in considering an issue that was not litigated and was wholly unrelated to the issues set for hearing.

As in *Iowa Lamb*, the Employer did not allege the hiring hall arrangement between Local 11 and the Employer as an objection and, in fact, maintained throughout the hearing and in its briefs that its historic bargaining relationship with Local 11 was lawful.[6] In her order directing hearing, the Regional Director did not identify the hiring hall relationship as an issue to be addressed at the hearing. The hearing officer did not inform the parties at the hearing that he intended to consider the hiring hall relationship in his report.

We further find that the lawfulness or unlawfulness of the Employer's historic bargaining relationship with Local 11 is unrelated to the issues set for hearing by the Regional Director. The fact that some evidence admitted in support of Objection 1 (the International's promises on job referral) and Objection 3 (the International's observer) may have peripherally touched on the hiring hall arrangement does not mean that the historic hiring hall relationship is "sufficiently related to the objections set for hearing," as the hearing officer found. To the contrary, we find that the legality of the arrangement is not reasonably encompassed within the scope of the objections set by the Regional Director for hearing.

[4] In agreeing with the hearing officer that Objection 3 should be overruled, we do not rely on fn. 11 of the hearing officer's report.

[5] The Regional Director found that the contract between Local 11 and the Employer was an "unlawful 'members only' agreement" and as such was not a bar to an election where the International is the Petitioner. In denying the Employer's request for review of the Regional Director's decision, the Board found it unnecessary to decide if the "members only" contract was an unlawful agreement because "in either event it does not constitute a bar to the instant petition."

[6] Further, in its exceptions to the hearing officer's report, the Employer admits that "the hearing officer's decision to set aside the election [because of the hiring hall relationship between the Employer and Local 11] was seriously flawed."

In addition, as in *Iowa Lamb,* the issue on which the hearing officer recommended setting aside the election was not fully litigated. In fact, the hearing officer limited the evidence on the hiring hall to that which would aid in a determination of whether the then-current hiring hall system was different from the system "promised" by the International in its campaign literature, and whether Local 11 President Volosevich had any role in assigning work through the hall. The hearing officer did not admit evidence on whether the hiring hall arrangement was lawful or unlawful. The matter, therefore, cannot serve as the basis for setting the election aside. The hearing officer's reliance on *American Safety Equipment Corp*., 234 NLRB 501 (1978), is misplaced. That case involves the duty of a Regional Director to consider evidence presented to him during the administrative investigation of the objections. As the Board made clear in its subsequent decisions in *Iowa Lamb* and *Precision Products*, once the objections are at the hearing stage, the parties are entitled to fair notice of the matters that can serve as the basis for setting the election aside. Accordingly, we shall issue a certification of representative.

CERTIFICATION OF REPRESENTATIVE

IT IS CERTIFIED that a majority of the valid ballots have been cast for the International Alliance of Theatrical Stage Employees and Moving Picture Technicians and Allied Crafts of the United States and its Territories and Canada, and that it is the exclusive collective-bargaining representative of the employees in the following appropriate unit:

> All full-time, regular part-time, and on-call stage hands, stage electricians, stage carpenters, dimmer board persons, stage riggers, property persons, loaders and unloaders, spotlight operators, cue persons, and sound persons employed by the Employer at its FleetBoston Pavilion in Boston, Massachusetts, but excluding all other employees, guards, and supervisors as defined in the Act.